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No. 00-200

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SEGUROS LA REPUBLICA, S.A.,

Petitioner,

v.

BRITISH INTERNATIONAL INSURANCE COMPANY LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York Insurance Law § 1213 requiring an alien unauthorized reinsurance company, which incurred an indebtedness while doing business in New York, to either: (i) obtain a license to do business in New York; or (ii) deposit a bond or cash requirements, after notice and hearing before defending an action to recover that indebtedness in New York, violates the Fourteenth Amendment's Due Process Clause?

STATEMENT PURSUANT TO RULE 29.6

Respondent British International Insurance Company's interests in this case were assigned to British Insurance Company of Cayman ("BICC") during the pendency of this action. BICC is wholly-owned by White Mountains Insurance Group, Ltd. ("White Mountains"). White Mountains' stock is publicly traded on the New York Stock Exchange.

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COUNTERSTATEMENT OF THE CASE

American Centennial Insurance Company ("ACIC") issued various insurance policies (excess, umbrella, general liability) to diverse insureds. ACIC reinsured these policies through the Petitioner, Seguros La Republica ("La Republica"), pursuant to 26 facultative certificates (the "Facultative Certificates").[1] ACIC paid losses to its insureds under these policies and then sought to recover the proportionate reinsurance owed it by La Republica.

The instant collection suit is occasioned by La Republica's refusal to indemnify Respondent British International Insurance Company, Limited's ("BIIC"), ACIC's successor-in-interest, pursuant to the Facultative Certificates. Presently, La Republica owes BIIC over $11 million. Pet. App. B at 15a-18a.

Following La Republica's refusal to honor its obligations under the Facultative Certificates, BIIC (ACIC) commenced this action in April 1990 by filing a complaint seeking (i) judgment against La Republica for breach of contract, account stated and monies due and owing, and (ii) a declaration that La Republica is obligated to indemnify BIIC for future losses reinsured by the Facultative Certificates.

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1. Facultative reinsurance is one of two basic types of reinsurance contracts. Facultative reinsurance is negotiated with respect to specific risks insured by particular policies. Barry R. Ostrager, Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 13.03 at 419 (3d ed. 1990). Under a facultative contract between the ceding insurer and the reinsurer, the reinsurer has the option of accepting or rejecting each risk offered by the ceding company, and a separate reinsurance certificate is issued with respect to each risk assumed. *Id.*

Since then, La Republica has argued before the United States Court for the Southern District of New York (the "Southern District") and United States Court of Appeals for the Second Circuit (the "Second Circuit") — and lost — issues involving personal jurisdiction, improper service of process, and the constitutionality of New York Insurance Law ("NYIL") § 1213. In doing so, the Southern District afforded La Republica every conceivable procedure to ensure that its rights were protected, including two separate evidentiary hearings and untold motions.

After a decade of motion practice, the Southern District ultimately entered a default judgment in favor of BIIC in the amount of $11,251,696.35, plus interest (Pet. App. C at 19a-20a), due to La Republica's failure to obtain a license to do business in New York or to comply with the Southern District's order directing it "to deposit with the Clerk of the Court cash or securities or a surety bond in the amount of Five Million Seven Hundred Thousand Dollars ($5,700,000) to secure payment of any final judgment that may be rendered in this action. . . ." Pet. App. E at 27a. *See* NYIL § 1213(c)(1).[2]

On June 16, 1999, La Republica appealed the default judgment. The Second Circuit rejected La Republica's attack on the constitutionality of NYIL § 1213 and affirmed the Southern District's ruling — holding specifically that "it comports with due process." *British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A.*, 212 F.3d 138, 144 (2d Cir.

2. While La Republica claims that Article 64 of Mexico's General Law of Insurance Institutions and Mutual Companies prohibits it from posting a bond (Pet. at 3), BIIC submitted expert evidence establishing the contrary. Thus, La Republica's failure to post a bond is due to its own intransigence.

2000).[3] This is the sole issue on which La Republica bases its Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

This Court should deny La Republica's Petition for Writ of Certiorari because: (i) there is no compelling reason to warrant review; and (ii) the Second Circuit's decision does not conflict with *Connecticut v. Doehr*, 501 U.S. 1 (1991) ("*Doehr*").

I. LA REPUBLICA'S PETITION FAILS TO STATE A REASON COMPELLING THIS COURT TO REVIEW THE CONSTITUTIONALITY OF NEW YORK INSURANCE LAW SECTION 1213

The sole question presented by La Republica's Petition is whether NYIL § 1213 as applied violates its constitutional right to Due Process under the Fourteenth Amendment. Pet. at *i*. For the reasons expressed in the Circuit Court's opinion below and as discussed herein under Point II, NYIL § 1213 as applied in this case passes constitutional muster. La Republica has not advanced a compelling reason to warrant this Court to grant review. Rules of Supreme Court, Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons").

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3. In a separate unpublished summary order entered the same day, the Second Circuit remanded for the Southern District's determination whether: (i) the facultative reinsurance certificates covered declaratory judgment expenses; (ii) BIIC's complaint sought recovery of declaratory judgment expenses; and (iii) the record supported La Republica's claim that BIIC failed to prove its entitlement to $52,987.22 in claims.

Moreover, the Second Circuit's decision conforms with the decisions of all other courts addressing the constitutionality of pre-answer security statutes. All analogous statutes have been held to be constitutional. *See* Rules of the Supreme Court, Rule 10(a) (reasons the Court considers in exercising its discretion to grant review includes whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort"). *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (as a matter of normal practice, the Court will defer to the construction of a state statute given to it by the lower federal courts).

Furthermore, La Republica has not sustained its burden to rebut NYIL § 1213's presumed constitutionality. "[A] statute is presumed to be constitutional, . . . and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993). In that context, NYIL § 1213 and other pre-answer security statutes have universally withstood constitutional challenges due to their recognized purpose to further a substantial government interest (*i.e.*, the regulation of insurance by the states). Indeed, not one court has struck down an insurance pre-answer security statute to date. *See, e.g.*, *Lakehead Pipe Line Co., Inc. v. American Home Assur. Co.*, 981 F. Supp. 1205 (D. Minn. 1997); *Mid-American Indemn. Ins. Co. v. King*, 1995 WL 407388 (S. Ct. Tx. 1995); *Curiale v. Ardra Ins. Co.*, 88 N.Y.2d 268, 667 N.E.2d 313 (1996); *Trihedron Int'l Assur. v. Superior Ct.*, 218 Cal. App. 3d 934, 267 Cal. Rptr. 418 (1990).

Section 1213 is New York's version of the Uniform Unauthorized Insurers Act (the "Unauthorized Insurers Act") promulgated by the National Association of Insurance Commissioners in 1948 (the "NAIC"). Forty states have adopted the Unauthorized Insurers Act in some form. (Res. App. A at 8a-14a).[4] The NAIC was acutely aware of due process concerns when drafting the Unauthorized Insurers Act:

> As to the Constitutionality of this section, reference may be made to the case of *Ownbey v. Morgan*, 256 U.S. 94 [(1921)], wherein the Delaware statute requiring posting of bond by a nonresident whose property has been attached before any defense could be made in the action was upheld. Care was taken in the drafting of the act to keep the same constitutional bounds.

Uniform Unauthorized Insurers Act, Prefatory Note, Section 6.

In *Ownbey*, this Court upheld, against due process challenges, a Delaware statute conditioning defendant's right to appear and contest the merits of plaintiff's demand upon his first giving security — in the form of special bail or a surety's undertaking — for the payment of judgment.[5]

4. Nebraska's, Ohio's and Oregon's version of the Unauthorized Insurers Act, however, does not contain pre-answer security requirements. Additionally, Pennsylvania has since repealed its enactment of the Act.

5. The obligation of the out-of-state debtor to post a bond under the Delaware statute at issue in *Ownbey* was triggered upon a creditor

(Cont'd)

In holding the statute constitutional, this Court stated that:

> the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

Ownbey, 256 U.S. at 102-03. Indeed, despite the debtor's claims of hardship, this Court unequivocally concluded that the statute was not arbitrary or unreasonable. *Id.* at 112.

New York courts have repeatedly upheld the constitutionality of NYIL § 1213 and its predecessor statute, Insurance Law § 59-a. *See Ace Grain Co. v. American Eagle Fire Ins. Co.*, 95 F. Supp. 784 (S.D.N.Y. 1951); *Zacharakis v. Bunkerhill Mut. Ins. Co.*, 281 A.D. 487, 120 N.Y.S.2d 418, 423-24 (1st Dept. 1953); *Kaye v. Doe*, 204 Misc. 719, 125 N.Y.S.2d 135, 139 (Sup. Ct. Bronx Co. 1953). In *Kaye v. Doe*, for example, the court found that if an unauthorized insurer voluntarily engaged in purposeful activity in New York which brought it within the purview of NYIL § 1213,

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(Cont'd)
attaching the in-state property of the debtor. An unauthorized alien reinsurer's obligation under Section 1213(c)(1) to post a bond or obtain a license, however, is triggered upon the commencement of a proceeding against it. *See infra* at 17.

there was no violation of any constitutional provisions arising from its application:

> Any other conclusion would tend to give the out-of-state insurer greater (not equal) protection of the laws, impair the just claims of New York citizens, and deprive them of the obligations to them voluntarily assumed by such insurer. *Due process does not impose such frustration.*

Id. at 142 (construing NYIL § 59-a) (emphasis added).

By voluntarily carrying on insurance business in New York, La Republica has consented and submitted to be sued there and it is subject to the conditions imposed by that state. New York may impose such terms and conditions as it deems proper and may exact such security for the performance of its contracts as in its judgment will best promote the public interest. *See Paul v. Virginia*, 75 U.S. 168, 181 (1869); *cf. Ace Grain Co.*, 95 F. Supp. at 787 (rejecting defendant's Constitutional challenge to the jurisdictional aspects of NYIL § 59-a noting that "[i]t is too late to question the power of New York to impose appropriate regulations on foreign insurers who seek authorization to do business in the state").

The business of insurance, particularly on an interstate and international level, is "affected with a vast public interest." *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Its regulation is left to the states pursuant to the McCarran-Ferguson Act. 15 U.S.C. § 1011, *et seq.* Accordingly, it is subject to the reasonable exercise of the state's police power. The only restriction on the exercise of this power is that the state's action shall be "reasonably related to the public interest and shall not be arbitrary or

improperly discriminatory." *Trihedron*, 218 Cal. App. 3d at 941, 267 Cal. Rptr. at 422 (citations omitted). The state's interest in ensuring that the obligations arising under insurance contracts and the consequences of those obligations are "faithfully carried out" are to be given "great weight" in determining the state's power to regulate. *Ace Grain*, 95 F. Supp. at 787 (quoting *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649 (1950)).[6]

Relying on this reasoning, the California Court of Appeals in *Trihedron* sustained the constitutionality of California's version of NYIL § 1213:

> Here, when a case arises out of a non-admitted foreign or alien insurer transacting business in California, the state has a valid interest in forcing the insurer to comply with the state's certification

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6. The obligations created through the provisions of NYIL § 1213 are well within the state's power to regulate the business of insurance. Indeed, as noted in *Dean Construction Company, Inc. v. Agricultural Insurance Co.*, 42 Misc. 2d 834, 249 N.Y.S.2d 247 (Sup. Ct. Nassau County), *aff'd*, 22 A.D. 82, 254 N.Y.S.2d 196 (N.Y.A.D. 1964):

> the public policy of this State is to afford residents protection against the obstacles encountered in pursuing their legal rights against alien insurers in foreign forums. The purpose is accomplished first by making unauthorized foreign insurers subject to the jurisdiction of our courts through service on the Secretary of State, and secondly, by requiring the deposit of money or the filing of a bond to insure a fund for the payment of any judgment that may be obtained in the action.

Id. at 249.

> requirements thereby protecting California insureds and beneficiaries. Section 1616 in the first instance requires compliance with those certification requirements. The statute provides the insurer with the generally less onerous alternative of posting a bond in lieu of meeting the certification requirements. Under the unique circumstances, *the bonding requirement can hardly be viewed as a deprivation of a significant property interest subject to due process requirements*. . . . Section 1616's requirements therefore do not deprive insurers of any substantial interest or existing right. Rather the section encourages compliance with the already existing statutory mandate. *Accordingly, we conclude section 1616 does not violate a non-admitted foreign or alien insurer's due process rights when the insurer is sued in connection with transacting insurance business in California.*

Trihedron, 218 Cal. App. 3d at 947-48, 267 Cal. Rptr. at 426 (emphasis added).

Accordingly, BIIC respectfully submits that La Republica's petition fails to establish any reason, let alone a "compelling" reason, for this Court to exercise its discretion to grant review. Therefore, BIIC requests that this Court deny La Republica's Petition for a Writ of Certiorari.

II. THE SECOND CIRCUIT'S RULING IS CONSISTENT WITH, NOT CONTRARY TO, WITH THE PRINCIPLES ENUNCIATED IN *CONNECTICUT v. DOEHR*

A. THE *DOEHR* LINE OF CASES SUPPORT THE CONSTITUTIONALITY OF NYIL § 1213.

La Republica's reliance upon *Doehr* and its progenitor cases is completely without merit. In those cases, this Court struck down prejudgment summary *ex parte* remedies available to general creditors. *Doehr*, 501 U.S. at 5 (attachment of real property); *Fuentes v. Shevin*, 407 U.S. 67, 91-92 (1971) (replevin of personalty); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (garnishment of wages). Unlike NYIL § 1213, each of the statutes at issue in those cases involved an outright seizure of property without notice or hearing, depriving its owner of actual possession and enjoyment of the property involved. Accordingly, the *Doehr* line of cases is readily distinguishable.

1. *Doehr*

Unlike the instant case involving a suit against an unlicensed insurance company doing business in New York for money it owes, *Connecticut v. Doehr* involved an action by one private citizen against another for unliquidated damages arising from an assault and battery. As *Doehr* correctly recognized, due process is not a "technical conception with a fixed content unrelated to time, place and circumstance." *Doehr*, 501 U.S. at 10 (citation omitted). *Doehr* dealt with procedural due process depriving a private individual of his property in favor of another private individual. That is on its face quite different from the

regulation and responsibilities of alien, unlicensed insurance and reinsurance companies who are doing business in New York and whose obligations arise out of that business. Even so, the proceedings herein meet the three pronged due process test of *Connecticut v. Doehr*.

First, of what property interest is the Petitioner deprived? La Republica has the right to defend the suit. All it needs to do is to obtain a license, as other insurance companies have done, to carry on business in New York — something which La Republica should have done when it entered into its agreement with BIIC. Alternatively, the Petitioner could post a bond or money to satisfy its proportionate share of the insurance losses paid to the insured by the plaintiff. A due process violation should not be triggered under these circumstances since this procedure is not the same as — or similar to — an attachment or lien on property.

Second, unlike *Doehr*, the risk of erroneous deprivation of property through the procedures under attack and the probable value of alternative safeguards is missing here. La Republica was afforded notice and a hearing. Contrary to *Doehr*, the issue here involves determining the "existence of a debt," an uncomplicated matter that lends itself to documentary proof. *Mitchell v. W.T. Grant & Co.*, 416 U.S. 600, 606 (1973) (upholding a statute finding that determining the existence of a debt or delinquent payments concerns uncomplicated matters than lend themselves to documentary proof). As noted above, La Republica can obtain a license to do business in New York. Further, if it chooses to post a bond or money, there is court supervision over the amount. The safeguards adequately reduce the risk.

Third, it is self-evident that BIIC's interest is not *de minimis*. As with any insurance company which pays its claims, BIIC needs the ability to obtain satisfaction of its reinsurance debts due and owing. This is in harmony with the state's interest in assuring that insurance companies subject to its jurisdiction meet their obligations.

Finally, although *Doehr* modified the third prong of the tripartite due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) from assessing "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail" (*Doehr*, 501 U.S. at 10 (citing *Mathews*, 424 U.S. at 335)) to assessing the interest of the private party seeking the prejudgment remedy, it did so with "due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Id.* at 11.

In this case, BIIC's interest — the collection of reinsurance balances owed to it under the Facultative Certificates — is on par with New York's ancillary interest as articulated in the preamble to NYIL § 1213.

> The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of

> resorting to distant forums for the purpose of asserting legal rights under such policies.

NYIL § 1213(a).[7] *See Signal Mut. Indem. Ass'n v. Rice Mohawk U.S. Constr. Co., Ltd.*, 1997 WL 148813, *2 (S.D.N.Y. Mar. 28, 1997) ("Insurance Law §1213(c) ensures that New York residents can readily access foreign insurer's funds to satisfy judgments against the insurer") (Res. App. C at 24a). Section 1213 may be invoked by *any* insurance company authorized to do business in New York. *See* § 1213(b)(1)(A); *Morgan v. American Risk Mgmt.*, No. 89 Civ. 2999, 1990 WL 106837 at *6 (S.D.N.Y. July 20, 1990) ("*ARM*") (extending § 1213 to "corporations authorized to do business" in New York) (Res. App. D at 45a); *Aero Assocs., Inc. v. La Metropolitana*, 183 F. Supp 357, 359 (S.D.N.Y. 1960) ("the primary objective of the legislation was to protect New York residents, but the statute went further and encompassed those corporations authorized to do business in New York").[8] Clearly, BIIC and New York

7. It is here that the safeguards of NYIL § 1213 protecting parties against having to endure the "insuperable obstacle of resorting to distant forums" is most illustrative. During the pendency of this case before the Southern District, La Republica filed suit in 1995 in Mexico against nine defendants and fifteen third-party defendants, including BIIC (the "Mexican action"). In doing so, La Republica sought, among other things, to have the very same Facultative Certificates at issue here declared void *ab initio*. La Republica also sought and was granted an injunction enjoining BIIC from taking any action in Mexico to enforce any judgments against La Republica until the Mexican action is completely resolved. Five years later, only BIIC and four of the other fifteen third-party defendants have been served with process in the Mexican action, thwarting any efforts by BIIC to enforce the default judgment in Mexico indefinitely.

8. BIIC's predecessor, ACIC, was authorized to do business in New York at all relevant times, including during the time La Republica issued the Facultative Certificates to ACIC.

have the same interest in seeing La Republica pay the $11 million plus claims it owes pursuant to the Facultative Certificates.

2. *Fuentes* and *Sniadach*

In *Fuentes*, this Court expressly recognized that prejudgment provisional creditors' remedies are fully justified when those provisions serve an important governmental interest or general public interest. *Fuentes*, 407 U.S. at 91. The Court, however, held the statutes unconstitutional because they allowed debtors' property to be seized without notice to the debtor. *Id.* at 83. As discussed above, that is not the case with NYIL § 1213.

Sniadach required a determination as to whether a Wisconsin statute which permitted an employer to garnish an employee's wages without notice violated the due process requirements of the Fourteenth Amendment. "What happens in Wisconsin is that the clerk of the court issues the summons at the request of the creditor's lawyer; and it is the latter who by serving the garnishee sets in motion the machinery whereby the wages are frozen." *Sniadach*, 395 U.S. at 339. The employee argued that the process deprived him of "his enjoyment of earned wages without the opportunity to be heard. . . ." *Id.* The *Sniadach* Court agreed with the employee and ruled Wisconsin's garnishment statute unconstitutional. The *Sniadach* Court's *ratio deciendi* turned on the fact that, although the statute ultimately gave the employee a right to be heard, such a provision had "little reality or worth unless one is *informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.*" *Id.* at 339-40 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Again, NYIL § 1213 unequivocally mandates that La Republica be served with notice of the matter. La Republica does not dispute this point. Indeed, after receiving such notice, La Republica chose to appear and over the next decade take advantage of all the due process protections it now claims were never afforded. La Republica seized every opportunity to be heard and to contest this matter. The fact that it lost on each of those opportunities — as it should have — does not diminish the constitutional safeguards afforded by NYIL § 1213. Hence, under the facts of this case and NYIL § 1213's constitutional pre-answer security requirements, BIIC submits that the potential for unwarranted attachment present in *Sniadach* and *Fuentes* is simply not present here.

B. NYIL § 1213 AND THE STATUTE AT ISSUE IN *DOEHR* ARE COMPLETELY DISSIMILAR

Even if NYIL § 1213 is analogized to the creditors' remedies at issue in *Doehr* and like cases, it readily transcends any constitutional challenge since the Connecticut statute at issue in *Doehr* is not even remotely similar to NYIL § 1213 The Connecticut statute provided, in relevant part, that:

> [t]he court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing . . . upon verification by oath of the plaintiff or of some competent affiant, that there is probable cause to sustain the validity of the plaintiff's claims and (1) that the prejudgment remedy requested is for an attachment of real property. . . .

Conn. Gen. Stat. § 52-278e (1991). The practical effect of the statute allowed the personal injury plaintiff in *Doehr* to obtain an *ex parte* attachment on defendant's real property. *Doehr*, 501 U.S. at 5.

By contrast, NYIL § 1213 does *not* operate to deprive La Republica of possession of its property. Rather, it provides the following choice

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> > *(A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties*, to be approved by the court, in an amount to be fixed by the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but *the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment* which may be entered in the proceeding, or
> >
> > *(B) procure a license to do an insurance business in this state.*

NYIL § 1213(c)(1)(A) and (B) (emphasis added). NYIL § 1213's security requirement, like the bond requirement upheld in *Ownbey*, is simply a condition precedent to the right to defend a particular type of suit under New York Insurance law. *Dean Constr. Co. v. Agric. Ins. Co.*, 42 Misc. 2d 834, 835, 249

N.Y.S.2d 247, 248 (Sup. Ct. Nassau Co. 1964). In this regard, NYIL § 1213 may be analogized to the requirement that an appellant post a supersedeas bond as a condition of obtaining a stay pending appeal — a requirement that has repeatedly withstood Constitutional scrutiny. *See, e.g., Christopher Lasalle and Company v. Heller Fin., Inc.*, 731 F. Supp. 279 (E.D. Ill. 1990).

Moreover, NYIL § 1213 merely imposes an obligation upon La Republica to deposit cash, securities or a bond — it does not authorize BIIC to take or seize any of La Republica's specific property. Indeed, NYIL § 1213 is the antithesis of an *ex parte* attachment — it "mandates court supervision before an insurer may be required to post security." *Curiale*, 88 N.Y.2d at 278. And, in enforcing the statute, the court does not rely on its equitable powers — NYIL § 1213 is self-executing since an unauthorized alien reinsurer's obligation to post security (or obtain a license to do business) is triggered upon notice of the proceeding commenced against it *and* before filing any pleading in that proceeding. *Moore v. Nat'l Distiller and Chem. Corp.*, 143 F.R.D. 526, 531 (S.D.N.Y. 1992), *aff'd*, 69 F.3d 1226 (2d Cir. 1995); *Curiale v. Phoenix Gen. Ins. Co. of Greece, S.A.*, 1992 WL 320535, *1 (S.D.N.Y. Oct. 23, 1992) (Res. App. B). Thus, all defendants subject to NYIL § 1213 are "provided notice and an opportunity to be heard. . . ." *Curiale*, 88 N.Y.2d at 278.

III. NYIL § 1213 APPLIES TO REINSURERS

Although the sole issue upon which La Republica bases its Petition is whether NYIL § 1213 violates its rights to due process, it nonetheless overtly seeks a decision that NYIL § 1213 only applies to insurers — not reinsurers. Pet. at 6-7. Although La Republica raised this argument in the Southern District and lost, it did not appeal this issue before the Second Circuit. *British Int'l*, 212 F.3d at 140-41. Nonetheless, the Second Circuit felt compelled "to address the point, as this status resolution underpins the statute's applicability." *Id.* at 141. In doing so, the Second Circuit looked to the *ARM* case, *supra*, and adopted its and other courts' "reasoning, that the argument that a reinsurance contract is not a 'policy of insurance' or a 'contract of insurance' is not sufficient to contravene the express language of § 1101(b)(2)." *Id.* (citing *ARM*, 1990 WL 106837, at *6 (Res. App. D at 41a-44a)). *Accord John Hancock Property and Cas. Ins. Co. v. Universale Reinsurance Co., Ltd.*, 147 F.R.D. 40, 50 (1993) (adopting the reasoning of *ARM*). *ARM* and thus, the Second Circuit, expressly rejected La Republica's attempted distinction:

> The express language of § 1101(b)(2) demonstrates that "although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, . . . it did not intend that unauthorized reinsurers be exempted from New York's long arm statute and security requirements."

* * *

> [Indeed], "it makes little sense for the legislature to protect residents by subjecting alien reinsurers to the jurisdiction of the New York courts, but not to have the security requirements."

British Int'l, 212 F.3d at 141 (citations omitted). Accordingly, the Second Circuit correctly rejected La Republica's contention that it did not have to comply with New York's licensing requirements. *British Int'l Ins. Co.*, 212 F.3d at 143 ((citing *Curiale*, 88 N.Y. 2d at 277, 644 N.Y.S.2d 663, 667 N.E.2d 313) ("[T]he ability to conduct insurance business free from legitimate government regulation is not a constitutionally protected property or liberty interest.")). *See Ace Grain*, 95 F. Supp. at 787 ("In requiring [La Republica] to post a sufficient bond as a condition of filing on answer and making defense, New York is requiring no more of [La Republica] than it constitutionally requires of any authorized foreign insurer. [La Republica] has no constitutional right to preferential treatment").

Finally, while advancing its argument before this Court that NYIL § 1101(b)(2)(G) exempts it from the licensing and other requirements imposed by New York's insurance law, La Republica conveniently ignores NYIL § 1108 which specifically identifies types of insurers who are exempt from New York's stringent insurance regulations; none of which apply to do unauthorized alien reinsurers such as La Republica. Although, La Republica suggests that it has unfettered discretion as to how it conducts business in New York, in reality La Republica is faced with a choice of becoming licensed to do business in New York or posting a bond or other security before defending any actions. The fact that La Republica is unwilling to comply with the choices offered by New York does not equate to a deprivation of its due process rights.

IV. DECLARING PRE-ANSWER SECURITY STATUTES ENACTED IN OVER THIRTY-SIX STATES UNCONSTITUTIONAL WOULD HAVE A SIGNIFICANT IMPACT ON THE GLOBAL REINSURANCE MARKET

La Republica's final claim is that continued enforcement of pre-answer security statutes restricts insurance companies' access to the entire global reinsurance market. La Republica's arguments stand the modern reinsurance world on its head.

Contrary to this argument, security statutes are directly responsible for the global reinsurance market's continued survival. One need only look to the proliferation of reinsurance disputes caused by, among other things, the environmental and product liability cases brought in the 1980s to see the fallacy of La Republica's logic. *See, e.g., Mutual Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.*, 868 F.2d 52 (3d Cir. 1989). Pre-answer security statutes which require financial certainty, helped the insurance market survive the 1980s and remain intact today. Indeed, if all reinsurers were permitted to breach their reinsurance obligations, abscond with the premiums, and take refuge behind their international borders, insurance companies would be forced to pay millions of dollars in claims without recourse to the reinsurance protection which was purchased. The potential catastrophic consequences — including the potential insolvency of the insurance company — should not be a policy goal of international reinsurance. *See Signal Mut.*, 1997 WL 148813, *2 (Res. App. C at 22a-24a) ("Insurance Law §1213(c) ensures . . . [ready] access [to] foreign insurer's funds to satisfy judgments against the insurer.").

Accordingly, BIIC respectfully submits that pre-answer security statutes help to maintain a level playing field as between a domestic insurer and its foreign or alien reinsurers. Therefore, contrary to La Republica's claims, any repudiation thereof would have a catastrophic effect upon the global reinsurance market.

CONCLUSION

For the reasons set forth above, Respondent BIIC respectfully requests that this Court deny La Republica's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — UNAUTHORIZED INSURERS PROCESS ACT

Model Regulation Service — October 1994

UNAUTHORIZED INSURERS PROCESS ACT

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Introduction

An Act relating to insurers not authorized to transact business in this state; providing for actions in this state against and for the service of process upon these insurers; prescribing how a defense may be made by these insurers; and providing for the allowance of attorneys' fees in actions against these insurers.

Section 1. Purpose of Act

The purpose of this Act is to subject certain insurers to the jurisdiction of courts of this state in suits by or on behalf of insureds or beneficiaries under insurance contracts.

The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued

or delivered in this state by insurers while not authorized to do business in this state, thus presenting to these residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under these policies. In furtherance of the state interest, the legislature herein provides a method of substituted service of process upon the insurers and declares that in so doing it exercises its power to protect its residents and to define, for the purpose of this statute, what constitutes doing business in this state, and also exercises powers and privileges available to the state by virtue of United States Code tit. 15 § 1011, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.

Section 2. Service of Process Upon Unauthorized Insurer

A. Any of the following acts in this state, effected by mail or otherwise, by an unauthorized foreign or alien insurer is equivalent to and shall constitute an appointment by the insurer of the Commissioner of Insurance and the commissioner's successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding instituted by or on behalf of an insured or beneficiary arising out of a contract of insurance, and any act shall be signification of its agreement that the service of process is of the same legal force and validity as personal service of process in this state upon the insurer.

(1) The issuance or delivery of insurance contracts to residents of this state or to corporations authorized to do business in the state;

(2) The solicitation of applications for insurance contracts;

(3) The collection of premiums, membership fees, assessments or other considerations for insurance contracts; or

(4) Any other transaction of insurance business.

Drafting Note: Insert the title of the chief regulatory official wherever the term "commissioner" appears.

B. Service of process shall be made by delivering to and leaving with the commissioner or some person in apparent charge of the office two (2) copies thereof and the payment of the fees prescribed by law. The commissioner shall forthwith mail by registered mail one of the copies of the process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon the commissioner. The service of process is sufficient, provided notice of such service and a copy of the process are sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing compliance are filed with the clerk of the court in which the action

is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

C. Service of process in an action, suit or proceeding shall, in addition to the manner provided in Subsection B of this section, be valid if served upon a person within this state who, in this state on behalf of the insurer, is:

(1) Soliciting insurance; or

(2) Making, issuing or delivering any contract of insurance; or

(3) Collecting or receiving any premium, membership fee, assessment or other consideration for insurance;

and a copy of the process is sent within ten (10) days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter in registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which the action is pending on or before the date the defendant is required to appear, or within a further time the court may allow.

D. A plaintiff or complainant shall not be entitled to a [insert appropriate state procedure, either judgment by default, or a judgment with leave to prove damages, or a judgment *pro confesso*] under this section until the expiration of thirty (30) days from the date of the filing of the affidavit of compliance.

E. Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

Section 3. Defense of Action By Unauthorized Insurer

A. Before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, the unauthorized insurer shall deposit with the clerk of the court in which the action, suit or proceeding is pending, cash or securities or file with the clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in the action; or procure a certificate of authority to transact the business of insurance in this state.

B. The court in any action, suit or proceeding in which service is made in the manner provided in Section 2B or 2C may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the

provisions of Subsection A of this section and to defend the action.

C. Nothing in Subsection A of this section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Section 2B or 2C on the ground either that:

(1) The unauthorized insurer has not done any of the acts enumerated in Section 2A; or

(2) The person on whom service was made pursuant to Section 2C was not doing any of the acts therein enumerated.

Section 4. Attorney Fees

In an action against an unauthorized foreign or alien insurer upon a contract of insurance issued or delivered in this state to a resident thereof or to a corporation authorized to do business therein, if the insurer has failed for thirty (30) days after demand prior to the commencement of the action to make payment in accordance with the terms of the contract, and it appears to the court that the refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney fee and include the fee in any judgment that may be rendered in the action. The fee shall not exceed twelve and one-half percent (12-1/2%) of the amount that the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall the fee be less than $25. Failure of an insurer to defend an action shall be deemed

prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

Section 5. Constitutionality

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 6. Short Title

This Act may be cited as the Unauthorized Insurers Process Act.

Legislative History (all references are to the Proceedings of the NAIC).

1949 Proc. 315-316 (adopted).
1951 Proc. 161, 166-168, 182 (printed and reaffirmed).

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The date in parentheses is the effective date of the legislation or regulation, with latest amendments.

NAIC MEMBER	MODEL/ SIMILAR LEGIS.	RELATED LEGIS./REGS.
Alabama	ALA. CODE §§ 27-10-50 to 27-10-56 (1951/1971).	
Alaska		ALASKA STAT. §§ 21.33.011 to 21.33.035 (1968/1992).
Arizona	ARIZ. REV. STAT. ANN. §§ 20-403 to 20-406 (1972).	
Arkansas	ARK. STAT. ANN. §§ 23-65-201 to 23-65-205 (1959).	
California	CAL. INS. CODE §§ 1610 to 1619 (1949/1982).	CAL. INS. CODE § 12931 (1970/1985).
Colorado	COLO. REV. STAT. §§ 10-3-1001 to 10-3-1005 (1955/1963).	

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Connecticut	CONN. GEN. STAT. § 38a-27 (1970/1990).
Delaware	DEL. CODE ANN. tit. 18 §§ 2101 to 2108 (1956).
D.C.	NO ACTION TO DATE
Florida	FLA. STAT. §§ 626.904 to 626.912 (1982).
Georgia	GA. CODE §§ 33-5-50 to 33-5-59 (1960).
Guam	GUAM GOV'T. CODE §§ 43129 to 43131 (1959).
Hawaii	HAWAII REV. STAT. §§ 431:8-206 to 431:8-211 (1988).
Idaho	IDAHO CODE §§ 41-1204 to 41-1210 (1961).
Illinois	215 ILL. COMP. STATS. 5/123 (1949/1983).

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Indiana	IND. CODE §§ 27-4-4-1 to 27-4-4-8 (1955/1985).	
Iowa		IOWA CODE § 507A.6 (1967).
Kansas	KAN. STAT. ANN. §§ 40-2001 to 40-2006 (1949).	
Kentucky	KY. REV. STAT. § 304.11-040 (1982).	
Louisiana	LA. REV. STAT. ANN. §§ 22:1253 to 1256 (1958/1968).	
Maine	ME. REV. STAT. ANN. tit. 24-A §§ 2102 to 2108 (1970/1973).	
Maryland		MD. ANN. CODE INS. § 4-206 (1957/1997).
Massachusetts	MASS. GEN. LAWS ch. 175B §§ 1 to 6 (1950).	
Michigan	NO ACTION TO DATE	

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Minnesota	MINN. STAT. § 60A-21 (1978/1984).
Mississippi	MISS. CODE ANN. §§ 83-21-33 to 83-21-51 (1958).
Missouri	MO. REV. STAT. §§ 375.256 to 375.301 (1967).
Montana	MONT. CODE ANN. §§ 33-1-611 to 33-1-616 (1959).
Nebraska	NEB. REV. STAT. §§ 44-137.01 to 44-137.10 (1949/1989).
Nevada	NEV. REV. STAT. §§ 685B.050 to 685B.080 (1971).
New Hampshire	N.H. REV. STAT. ANN. §§ 406-B:4 to 406-B:7 (1967/1971).
New Jersey	N.J. REV. STAT. §§ 17B:33-1 to 17B:33-9 (1971); 17:51-1 to 17:51-5 (1952/1953).

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New Mexico	N.M. STAT. ANN. §§ 59A-15-6 to 59A-15-8 (1985).	
New York	N.Y. INS. LAW § 1213 (1984).	
North Carolina	N.C. GEN. STAT. § 58-16-35 (1955/1990).	
North Dakota	N.D. CENT. CODE §§ 26.1-02-10 to 26.1-02-12 (1983).	
Ohio	OHIO REV. CODE ANN. § 3901.26 (1965).	
Oklahoma		OKLA. STAT. tit. 36 §§ 1103 to 1105 (1957).
Oregon	OR. REV. STAT. §§ 746.320 (1967/1981).	
Pennsylvania	PA. CONS. STAT. § 40-1-206 (1976).	
Puerto Rico		P.R. LAWS ANN. tit. 26 §§ 1005 to 1006 (1977).

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Rhode Island	R.I. GEN. LAWS §§ 27-16-3 to 27-16-14 (1956).	
South Carolina	S.C. CODE ANN. §§ 38-25-510 to 38-25-560 (1988).	
South Dakota	S.D. CODIFIED LAWS ANN. §§ 58-8-6 to 58-8-19 (1966/1975).	
Tennessee	TENN. CODE ANN. §§ 56-2-601 to 56-2-609 (1955).	
Texas	TEX. INS. CODE ANN. art. 1.14-1 (1967/1983); art. 1.35 (1987).	
Utah		UTAH CODE ANN. §§ 31A-2-309 to 31A-2-311 (1965).
Vermont	VT. STAT. ANN. tit. 8 §§ 3381 to 3390 (1968).	
Virgin Islands		V.I. CODE ANN. tit. 22 § 665 (1968).

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Virginia		VA. CODE §§ 38.2-800 to 38.2-807 (1986).
Washington		WASH. REV. CODE ANN. §§ 48.05.200 to 48.05.220 (1947/1981).
West Virginia	W.VA. CODE § 33-4-13 (1957/1992).	
Wisconsin		WIS. STAT. §§ 601.72 to 601.73 (1979/1981).
Wyoming		WYO. STAT. §§ 26-12-201 to 26-12-206 (1967/1983).

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *CURIALE v. PHOENIX GENERAL INSURANCE COMPANY OF GREECE, S.A.*, No. 83 Civ. 4687 (CSH) DATED OCTOBER 23, 1992

United States District Court
S.D. New York.

Salvatore R. CURIALE, Superintendent of Insurance of the State of New York, as Liquidator of Ideal Mutual Insurance,

Plaintiff,

v.

PHOENIX GENERAL INSURANCE COMPANY OF GREECE, S.A.,

Defendant.

No. 83 Civ. 4687 (CSH).

Oct. 23, 1992.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

By Notice of Motion dated December 27, 1991, plaintiff moves for an order compelling defendant to post security for judgment, pursuant to New York Insurance Law § 1213(c)(1)(A). In the alternative, plaintiff moves to strike

defendant's answer and moves for the entry of a default judgment.

Familiarity with the facts of this case, which are set forth in several previous opinions by this Court, is assumed. For the purposes of this motion, the relevant facts are set forth briefly as follows.

Plaintiff Salvatore R. Curiale is the Liquidator of the Ideal Mutual Insurance Company ("Ideal"), a New York corporation. Defendant Phoenix General Insurance Company of Greece, S.A. ("Phoenix") is an insurance company organized under the laws of Greece.

From 1975 to 1984, Ideal used the services of Global Aviation Insurance Manager, Inc. ("Global Aviation") to manage the reinsurance of aviation insurance policies issued by Ideal. Global in turn used the services of London reinsurance intermediaries, who negotiated reinsurance treaties with an array of reinsurers, including defendant Phoenix. In this lawsuit Curiale, Ideal's Liquidator, seeks more than $1.6 million in damages for Phoenix's breach of reinsurance agreements.

After referring the case to arbitration on July 2, 1984, this Court rescinded the arbitration order in 1987 and restored the case to the Court's active calendar. In December 1988 this Court entered an order formally substituting the Liquidator as the plaintiff. Settlement negotiations collapsed in early 1991, and Curiale filed an amended complaint on July 9, 1991. The amended complaint set forth the specific balances owed to the Liquidator under the relevant

reinsurance agreements. On July 26, 1991, defendant answered. Plaintiff advised defendant of the security requirements of § 1213(c)(1)(A), but defendant resisted. Plaintiff then filed the motion presently before the Court.

Defendant opposes plaintiff's motion on three grounds: 1) that Section 1213(c)(1)(A) of the New York Insurance Law applies to insurers — not reinsurers; 2) that plaintiff waived its right to raise the security requirement; and 3) that the application of Section 1213(c)(1)(A) to this case would be unconstitutional.

The first issue raised by Phoenix has previously been considered by this Court. For the reasons stated in Morgan v. American Risk Management, Inc., 89 Civ. 2999, 1990 WL 106837 (S.D.N.Y. July 20, 1990), I hold that Section 1213(c) applies to reinsurers as well as insurers. See also Moore v. National Distillers and Chemical Corporation, 91 Civ. 2901, 1992 WL 238181 (S.D.N.Y. Aug. 14, 1992); American Centennial Insurance Company v. Seguros La Republica, S.A., 91 Civ. 1235, 1992 WL 162770 (S.D.N.Y. June 22, 1992); American Centennial Insurance Company v. Seguros La Republica, S.A., 90 Civ. 2370, 1992 WL 147626 (S.D.N.Y. June 16, 1992).

The waiver argument has also been addressed by this Court. In her opinion in Moore, Magistrate Judge Roberts noted that "the language of § 1213 does not require a timely demand of pre-answer security; the language only sets a trigger for security." 1992 WL 238181, at *4. In the case at bar, Curiale simply waited until defendant answered to see if defendant would post the security. Defendant did not do

so, so plaintiff filed the present motion. That hardly provides fodder for a waiver argument.

As for defendant's third argument, the New York legislature enacted § 1213 pursuant to that power conferred upon the States by the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq. As the Supreme Court has stated, "Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act. . . ." Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 653 (1981) (citations omitted). See also Levy v. Lewis, 635 F.2d 960, 963-64 (2d Cir.1980) (McCarran-Ferguson states a clear congressional mandate "that regulation of the insurance industry be left to the individual states."). Accordingly, I reject Phoenix's constitutional attack. See Moore, 1992 WL 238181, at *6.

The defendant is directed to post a bond with the Clerk of the Court in the amount of $1,633,674.92 by November 16, 1992. If defendant fails to do so, its answer will be stricken and default judgment will be entered against it.

It is SO ORDERED.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD. v. RICE MOHAWK U.S. CONSTRUCTION COMPANY, LTD.*, No. 95 Civ. 3721 (LMM) DATED MARCH 28, 1997

United States District Court,
S.D. New York.

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
a foreign corporation,

Plaintiff,

v.

RICE MOHAWK U.S. CONSTRUCTION COMPANY,
Ltd., a New York corporation,

Defendant.

No. 95 Civ. 3721 (LMM).

March 28, 1997.

MEMORANDUM AND ORDER

MCKENNA, District Judge.

Defendant, Rice Mohawk U.S. Construction Company, Ltd. ("Rice") moves to strike the reply of Plaintiff, Signal Mutual Indemnity Association, Ltd. ("Signal"), to Rice's

counterclaim, on the ground that Signal failed to comply with state insurance law.

For the reasons set forth below, Defendant's motion to strike Signal's reply to its counterclaim and for entry of default judgment on its counterclaim is denied on the condition that plaintiff post a bond for $100,000 in accordance with New York Insurance Law § 1213(c)(1) within forty-five (45) days of the date of this Memorandum and Order.

I. Factual Background

Signal is a foreign corporation, incorporated under the laws of Bermuda, with its principal place of business in Bermuda. As a self-insurer under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., ("LHWCA"), Signal provides insurance coverage to its "members," most of which are employers whose employees are covered by the LHWCA. (Complaint ¶¶ 1, 3-4). Rice is a New York corporation with its principal place of business in New York. (Complaint ¶ 2).

In November 1992, Signal and Rice entered into a contract whereby Rice became a "member" of Signal in exchange for Signal's commitment to provide workers' compensation to Rice's entitled employees. (Complaint ¶¶ 4, 5). Under state law, Signal's obligations to Rice allowed Signal to operate as a foreign insurer in New York.

On May 22, 1995, Signal commenced this action by filing a complaint against Rice for breach of this contract.

Signal alleges that Rice failed to make mandatory payments in accordance with Signal's by-laws.[1] On July 18, 1996, Rice answered the complaint and counterclaimed, alleging that Signal, not Rice, breached the contract in question. Rice, citing Signal's failure to comply with a New York State Insurance Law provision, moves to strike Signal's reply to Rice's counterclaim and to enter a default judgment in its favor.

II. Discussion

A. New York Insurance Law § 1213(c)(1)

Federal regulations require LHWCA self-insurers to deposit funds in the United States as security and proof of financial accountability. 20 CFR § 703.301 (1996). New York State insurance laws require foreign insurers to deposit a bond with the court or to procure an insurance license from the state before such insurer pleads in any proceeding against that insurer. N.Y. INSURANCE LAW § 1213(c)(1) (McKinney 1985). Signal maintains accounts in Illinois, in accordance with the federal requirement, but has neither deposited a bond nor received an insurance license in New York to comply with state law.

Rice argues that Signal's failure to comply with § 1213(c)(1) precludes Signal from replying to Rice's counterclaim. Signal counters that although it has failed to

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1. For a more detailed history of this dispute, see this Court's order denying defendant's 12(b)(1), 12(b)(4), and 12(b)(6) motions dated June 17, 1996.

comply with § 1213(c)(1), the LHWCA pre-empts the New York statute. According to Signal, this federal pre-emption relieves Signal of any obligation to comply with the New York law.

B. Pre-emption Generally

The pre-emption doctrine, under which Federal statutes displace state laws and regulations, originates in the Supremacy Clause, U.S. CONST., Art. VI, cl. 2. Consideration of the pre-emption doctrine requires the court to examine both explicit and implicit congressional intent. Barnett Bank of Marion Country, N.A. v. Nelson, 517 U.S. 25, __, 116 S.Ct. 1103, 1107, 134 L.Ed.2d 237 (1996); Fidelity Fed. Say. and Loan Assoc. v. de la Cuesta, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982). Rarely will the language of a federal statute explicitly state that federal law pre-empts existing state laws. Barnett Bank, 517 U.S. at __, 116 S.Ct. at 1108. Therefore, the court must consider the language and purpose of the federal statute in search of an implicit intent to pre-empt state law. Id.; Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 461 U.S. 190, 203, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983).

Absent such intent, federal law will pre-empt state law only when compliance with both is either a "physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), or when the state law impedes Congress' objectives. Fidelity Fed., 458 U.S. at 153 (quoting Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941)).

Consequently, application of the pre-emption doctrine must remain flexible, "especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." Farmer v. United Bhd. of Carpenters and Joiners of Am., 430 U.S. 290, 302, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

C. The Longshore and Harbor Workers' Compensation Act

Congress created the LHWCA to guarantee compensation for marine workers previously excluded by the then-existent maritime laws. Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 717-718, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980). Signal contends that the self-insurer regulations contained in the LHWCA evidence Congress' intent to pre-empt state laws governing workers' compensation. In Sun Ship, Inc., however, the Supreme Court found "no sign . . . that Congress wished to alter the accepted understanding that federal jurisdiction would co-exist with state compensation laws." Id. at 722 (holding that injured maritime workers eligible for compensation under the LHWCA could nevertheless claim compensation under state compensation laws).

Nor has Congress tacitly indicated a desire to pre-empt New York state insurance law. A state law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). In the instant case, Signal

can adhere to state regulations without compromising Congress' interests in the welfare of the maritime workers. Florida Lime, 373 U.S. at 142-43.

Signal fails to differentiate between Congress' purpose in creating the LHWCA, and the New York legislature's purpose in establishing the laws governing foreign insurers. Congress enacted the LHWCA in the interest of maritime workers. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Perini North River Assoc., 459 U.S. 297, 306, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). In contrast, the New York legislature created Insurance Law § 1213(c) for the protection of its residents. N.Y. INSURANCE LAW § 1213(c) (McKinney 1985 & Supp. 1997); Curiale v. Ardra Ins. Co., 88 N.Y.2d 268, 644 N.Y.S.2d 663, 667-8, 667 N.E.2d 313 (Ct.App.1996). Insurance Law § 1213(c) ensures that New York residents can readily access a foreign insurer's funds to satisfy judgments against that insurer. Curiale, 644 N.Y.S.2d at 667, 667 N.E.2d 313. Such precautions enable foreign insurers like Signal to operate in New York without first obtaining insurance licenses. Consequently, this provision benefits both the residents of New York and the foreign insurance companies allowed to operate in New York.

D. McCarran-Ferguson Act Anti-Pre-emption Rule

The McCarran-Ferguson Act instructs that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C.

§ 1012(b) (1976). Signal argues that the existence of this statute, and the language contained therein, provides further evidence of Congress' intent to pre-empt states' participation in insurance regulation. Signal overlooks, however, that the "the first clause of [§ 1012] 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws." U.S. Dep't. of Treasury v. Fabe, 508 U.S. 491, 505, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

The McCarran-Ferguson Act expands state control over insurance industries operating within the state. This expansion necessarily includes New York State's ability to regulate the activities of foreign insurers. Additionally, Congress created the McCarran-Ferguson Act to ensure that state regulation would not be subject to inadvertent federal intrusion. Barnett Bank, 517 U.S. at __, __, 116 S.Ct. at 1112, 15 U.S.C. § 1012 (1976 & Supp.1996). The Act provides that state law should prevail unless a federal statute specifically relating to the "business of insurance" conflicts with a state law. 15 U.S.C. § 1012 (1976 & Supp.1996); see also Barnett Bank, 517 U.S. at __, 116 S.Ct. at 1111. No such conflict exists between the New York State law for foreign insurers and insurer obligations enumerated under the LHWCA.

Finally, to qualify for exception under the McCarran-Ferguson Act, the LHWCA would have to specifically relate to the "business of insurance." As discussed above, the

LHWCA creates and guarantees workers' compensation for maritime workers. 33 U.S.C. § 901, et seq. (1986 & Supp. 1996). Thus, the insurance policies created to support the provisions of the LHWCA are incidental.

III. Conclusion

For the reasons set forth above, defendant's motion to strike plaintiff's reply and for entry of default judgment on its counterclaim is denied on the condition that plaintiff post a bond for $100,000 in accordance with § 1213(c) of the New York Insurance Law within forty-five (45) days of the date of this Memorandum and Order. Either party may move, for good cause shown, to increase or decrease the amount of the bond.

SO ORDERED.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN *MORGAN v. AMERICAN RISK MANAGEMENT, INC.*, No. 89 CIV 2999 (JSM) (KAR) DATED JULY 20, 1990

United States District Court,
S.D. New York.

Leroy MORGAN, Commissioner of Insurance of the Commonwealth of Kentucky, in his capacity as Liquidator of Delta America Re Insurance Company,

Plaintiff,

v.

AMERICAN RISK MANAGEMENT, INC., et al.,

Defendants.

No. 89CIV2999(JSM)(KAR).

July 20, 1990.

* * *

OPINION AND ORDER

KATHLEEN A. ROBERTS, United States Magistrate:

This action for declaratory relief, specific performance, and damages arises from a management contract and reinsurance treaties entered into by Delta America Re

Insurance Company ("Delta Re") and defendants. The suit was filed on May 2, 1989 and referred to me on July 18, 1989 to supervise discovery, and on October 30, 1989 to decide the pending motion.

Plaintiff, the Kentucky Commissioner of Insurance, commenced this action in his capacity as the Liquidator of Delta Re, an insolvent reinsurance company chartered under the laws of Kentucky and, prior to its insolvency, authorized to do business in New York. Complaint ¶¶ 1, 2. Defendant American Risk Management, Inc. ("ARM"), an Ohio Corporation, provided management services to Delta Re from 1983 until the reinsurance company was declared to be insolvent in September, 1985. Id. ¶¶ 4, 7. Defendant Frederic Reiss was the sole shareholder and chairman of ARM, as well as of defendants International Risk Management Limited, European Risk Management Limited, Transnational Risk Management Limited, Universal Management Limited, and Transnational Risk Management (Guernsey) Limited, foreign corporations that also provided insurance management services. These foreign corporations, together with ARM, were allegedly operated under a common management structure headed by Mr. Reiss. Id. ¶¶ 5, 6. Defendants Robert Norton, John Ryan, Brian Murphy, and Arthur Deters, were officers and directors of Delta Re and of ARM or of other Reiss companies. Id. ¶¶ 8-12. The remaining defendants are twenty-three foreign and alien retrocessionaires (the "retrocessionaires"), who signed reinsurance treaties[1] with Delta Re, agreeing to accept a share

1. A contract for reinsurance is called a "reinsurance treaty." Reinsurance is "the ceding by one insurance company to another of (Cont'd)

of the risks underwritten by Delta Re in 1984 and 1985.[2] Id. ¶¶ 15-37. The treaties were delivered to and signed by Delta Re in New York.

Presently before the court is a motion by the retrocessionaires to be relieved of the requirement of posting pre-answer security pursuant to N.Y.Ins.Law § 1213(c)(1) (McKinney 1985),[3] which plaintiff contends is applicable to

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(Cont'd)
all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer is solely to the reinsured, which is the ceding company, and in which contract the ceding company retains all contact with the original insured, and handles all matters prior to and subsequent to loss." 13A J. Appleman & J. Appleman, Insurance Law and Practice § 7681, at 480-81 (rev. ed.1976). Retrocessionaires, in turn, reinsure the risks assumed by the reinsurer. See Complaint ¶ 13.

2. The retrocessionaires are companies organized under the laws of, and operating in various foreign jurisdictions, including Bermuda, the Cayman Islands, and the Channel Islands. Two of the retrocessionaires are organized under the laws of Vermont. None of them is authorized to conduct an insurance business in New York.

3. Section 1213(c)(1) provides:

> Before any unauthorized foreign or alien insurer files any pleading in any proceeding against it, it shall either:
>
> (A) deposit with the clerk of the court in which the proceeding is pending, cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by

(Cont'd)

this action.[4] See Complaint ¶ 39. The retrocessionaires argue

(Cont'd)

> the court sufficient to secure payment of any final judgment which may be rendered in the proceeding, but the court may in its discretion make an order dispensing with such deposit or bond if the superintendent certifies to it that such insurer maintains within this state funds or securities in trust or otherwise sufficient and available to satisfy any final judgment which may be entered in the proceeding, or
>
> (B) procure a license to do an insurance business in this state.

4. The following defendant-retrocessionaires are represented by Bower & Gardner: Aegis Indemnity Ltd., Bakerlooe Insurance Co., Ltd., Berda Developments Ltd., Brittany Insurance Co., Ltd., Centennial Assurance Co., Ltd., Conoplex Insurance Co., Ltd., Constantine Insurance Co., Ltd., Elco Insurance Co., Inc., Elwood Insurance Co., Ltd., General Insurance Co., Ltd., Horizon Insurance Co. Ltd., Riscott Insurance Ltd., Ross Insurance Ltd., Sperry Insurance Co., Ltd., Three Rivers Insurance Co., Trochus Insurance Company, Ltd., Twinsurance, Ltd., United Insurance Co., ver Bes' Insurance Co., and Westburne Insurance Co., Ltd. Bower & Gardner submitted a memorandum of law dated September 5, 1989 ("Bower & Gardner Memorandum") and a reply letter dated October 18, 1989 ("Bower & Gardner Reply"). Defendant-retrocessionaire Saturn Insurance Co., Ltd., is represented by Jones, Day, Reavis & Pogue, who submitted a letter memorandum of law dated September 5, 1989 ("Jones, Day Memorandum") and a reply letter dated October 13, 1989 ("Jones, Day Reply"). Defendant-retrocessionaire Transnational Ltd. is represented by LeBoeuf, Lamb, Leiby & MacRae, who submitted a letter memorandum of law dated October 13, 1989 ("LeBoeuf, Lamb Memorandum") and a reply letter dated

(Cont'd)

1) that the statute is inapplicable to disputes over reinsurance treaties; 2) that even if the statute did apply to reinsurance, plaintiff is not presently a "resident" of New York, and therefore not entitled to invoke it; and 3) that the statute can only apply to actions to determine the scope of an insurance contract — that is, to coverage claims — not to an action such as this one to determine the contract's validity. In the alternative, the retrocessionaires argue that the amount of pre-answer security should be no more than that which would be immediately payable to plaintiff upon a judgment in his favor.

For the reasons set forth below, I find that the retrocessionaires are required to post pre-answer security pursuant to § 1213(c)(1). However, I find that the amount of security should not exceed the retrocessionaires' proportionate share of Delta Re's paid losses — that is, the amount that Delta Re's ceding insurance companies have reported as paid claims — minus the amount the Liquidator has already drawn down on the letters of credit earlier provided by the retrocessionaires.

(Cont'd)
May 1, 1990 ("LeBoeuf, Lamb Reply"). Defendant-retrocessionaire Trafford Park Insurance, Ltd. is represented by Werbel McMillin & Carnelutti and joined in the pending motion by a letter to the court dated September 5, 1989.

Plaintiff submitted a memorandum of law dated October 2, 1989 ("Plaintiff's Memorandum") and a sur-reply memorandum of law dated May 1, 1990 ("Plaintiff's Sur-Reply").

Appendix D

BACKGROUND

On September 30, 1983, Delta Holdings, Inc. bought Elkhorn Insurance Company ("Elkhorn") from National Distillers and Chemical Corporation ("Distillers") for $18 million.[5] After its sale, Elkhorn was renamed Delta Re.

Delta Re was a reinsurance company organized under the laws of Kentucky, with offices in Louisville, Kentucky and New York City. Prior to insolvency proceedings in 1985, Delta Re was licensed to conduct an insurance business in New York and Kentucky. Delta Re and the retrocessionaires entered into a one-year 40% Quota Share Treaty ("Treaty") effective January 1, 1984. This Treaty, actually twenty-four separate agreements with the individual retrocessionaires, was renewed effective January 1, 1985. In each case, the Treaty was delivered to Delta Re in New York. Under the Treaty, Delta Re ceded to each retrocessionaire a given percentage of its risks, totalling 40 percent of Delta Re's business. Before Delta Re's liquidation, the retrocessionaires provided Delta Re with $5.3 million dollars in irrevocable letters of credit, in compliance with Article X of the Treaty, which gave Delta Re the right to request funding for "unearned premiums and outstanding losses including, where appropriate, an allowance for incurred but not reported losses * * *."

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5. In Delta Holdings, Inc. v. National Distillers and Chemical Corp., 85 Civ. 3439 (April 10, 1990), Judge Keenan ordered the rescission of the sale of Elkhorn because of Distillers' misrepresentations and omissions regarding the true financial condition of Elkhorn, which had been insolvent for some time prior to the sale. Distillers, renamed Quantum Chemical Corporation, has been joined as a third-party defendant in this action.

Appendix D

On September 15, 1985, the Franklin, Kentucky Circuit Court found Delta Re to be insolvent and appointed plaintiff as Liquidator to supervise its dissolution. When the retrocessionaires learned that Delta Re had been insolvent as early as 1983, at the time it solicited their participation in the 40% Quota Share Treaty, they notified the Liquidator of their rescission of the Treaty, on the alternative grounds of misrepresentation or mutual mistake of fact. The Liquidator then demanded that the retrocessionaires post additional letters of credit pursuant to Article X of the Treaty. The retrocessionaires, who regarded the Treaty as void, refused to do so. Prior to commencement of this action, the Liquidator drew down the $5.3 million in letters of credit earlier provided by the retrocessionaires and treated the cash — today totalling over $6 million (including interest) — as assets of Delta Re.

The Liquidator commenced this action against Delta Re's retrocessionaires and against the management company that operated Delta Re on May 2, 1989. The complaint alleges that the retrocessionaires have refused to pay sums due Delta Re under the Treaty and have indicated their refusal to pay sums that may become due in the future. Complaint ¶ 55. The Liquidator alleges that the Treaty is fully enforceable and seeks a declaratory judgment of the parties' rights and obligations under it. Id. ¶¶ 56, 58. The Liquidator further seeks damages in the amount of the sums allegedly past due under the Treaty, as well as an order requiring the retrocessionaires to specifically perform their future payment obligations under the Treaty. Id. ¶ 62. As against the management company, the Liquidator seeks to recover the same sums and all future "reinsurance recoverables" if the

retrocessionaires are held not liable for them. Id. ¶¶ 56, 66, 69.

Pursuant to N.Y.Ins.Law § 1213(c)(1), plaintiff also seeks an order directing the retrocessionaire defendants to post a bond for $41,893,700, an amount consisting of three components. Plaintiff's Memorandum at 3; Affidavit of James E. Dickinson, dated September 28, 1989 (Dickinson Aff.) The first component ($6,746,071), "paid losses," consists of claims that the ceding insurance companies have reported as paid and for which the ceding companies await indemnification from Delta Re. The second component ($12,672,729), "case reserves" or "outstanding loss reserves," are claims of loss received by the ceding companies and reported to Delta Re, but not yet paid by the ceding companies. The third component ($22,474,900), "incurred but not reported losses" (IBNR), represents an actuarial estimate of Delta Re's liability for losses that have occurred, but have not yet been reported as claims. See Dickinson Aff. ¶¶ 7-8, 10; Bower & Gardner Memorandum at 8; Jones, Day Memorandum at 13-14.

The Parties' Contentions

The retrocessionaires argue that the statute does not apply to disputes over reinsurance treaties. See Bower & Gardner Memorandum at 11-14; Jones, Day Memorandum at 6-10; LeBoeuf, Lamb Memorandum at 6-10. This argument is based, in part, on the statement of legislative intent contained in § 1213(a), which declares that the statute was intended to aid residents holding "policies of insurance" delivered in the state by unauthorized insurers, by making

those insurers amenable to process in New York. N.Y.Ins. Law § 1213(a). Reinsurance treaties, the retrocessionaires assert, are not "policies of insurance," but "contracts of indemnity," a category that the statute does not cover. Moreover, the retrocessionaires contend, § 1213 was intended as a "consumer" statute, designed to equalize the balance of power between the small policyholder and the large, sophisticated insurance company, not as a tool for an experienced reinsurance company to gain a "tactical advantage" over other reinsurers, with whom it stands on equal footing. Bower & Gardner Memorandum at 10-11; Jones, Day Memorandum at 8-10; LeBoeuf, Lamb Memorandum at 3-4.

The retrocessionaires further argue that the Liquidator is not entitled to invoke the pre-answer security requirement of § 1213(c)(1) because Delta Re, which has not been authorized to do business in New York for over four years, is not presently a "resident" of New York. Bower & Gardner Memorandum at 12-14; Bower & Gardner Reply at 1-5; Jones, Day Reply at 3-4. Moreover, the retrocessionaires claim that "simple authorization to do business" in New York is insufficient for a foreign insured to invoke the statute; rather, the foreign insured must actually be conducting business in New York before it can seek pre-answer security. On this basis, the retrocessionaires also suggest that application of § 1213 to this action will violate their due process rights. Bower & Gardner Reply at 4-5. As a policy matter, the retrocessionaires point out the irony of allowing a Kentucky liquidator to travel to a New York court and invoke a security requirement intended to prevent New York residents from having to resort to "distant forums" to enforce

rights under their insurance policies.[6] Jones, Day Memorandum at 10; see N.Y.Ins.Law § 1213(a).

In addition, the retrocessionaires argue that § 1213(c)(1) was intended to apply to coverage claims, that is, to disputes over whether a given claim falls within the terms of a valid insurance policy. Jones, Day Memorandum at 10-11; Jones, Day Reply at 4. In this action, the retrocessionaires point out, the validity of the reinsurance treaty itself is at issue. They argue that it would be unfair to require them to tie up a huge amount of assets — thereby giving the Liquidator undue leverage — where, if they prevail, it will be found that the Liquidator holds no enforceable rights against them at all.

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6. The retrocessionaires suggest that the Liquidator's motive for bringing this suit in New York is to take advantage of the security requirement of § 1213. They contend that Kentucky's cognate statute, Ky.Rev.Stat. § 304.11-040(7) (1987), exempts reinsurers from posting pre-answer security. Bower & Gardner Reply at 2 & n. 1; LeBoeuf, Lamb Memorandum at 6 & n. 3. It is not at all clear that this is the case. Their argument is that because § 304.11-030(1)(b) allows reinsurers to transact business in Kentucky without a certificate of authority, and because § 304.11-040(7) requires unauthorized insurers to post security or procure a certificate of authority before filing a pleading in a court action, reinsurers are not subject to the security requirement. On the other hand, plaintiff insists that the retrocessionaires would be subject to the pre-answer security requirement in Kentucky. See Plaintiff's Memorandum at 5; Plaintiff's Sur-Reply at 18-19. Moreover, at a conference before me on February 2, 1990, plaintiff offered to bring this action in Kentucky if defendants would consent to jurisdiction there; the Bower & Gardner defendants objected to any such change of venue. In any event, because I find that § 1213 expressly applies to reinsurers, I need not consider the scope of Kentucky's cognate statute.

Jones, Day Memorandum at 11. Moreover, the retrocessionaires claim that the merit of their defense is clear, given Judge Keenan's recent finding in Delta Holdings, Inc. v. National Distillers and Chemical Corp., 85 Civ. 3439 (April 10, 1990), that Delta Re had been insolvent long before it solicited the retrocessionaires' participation in the Treaty. See Letter of Thomas Newman, Esq. to Magistrate Roberts dated April 18, 1990; Letter of William Primps, Esq. to Magistrate Roberts dated April 19, 1990; see also Complaint ¶ 45 (alleging that Delta Re "was technically insolvent as early as 1982").

Finally, defendant Transnational Limited points to Regulation 98, N.Y.Comp.Codes R. & Regs. tit. 11, §§ 32.0-32.4 (1982) ("Regulation 98"), promulgated by the New York Superintendent of Insurance, which it claims would be superfluous if § 1213(c)(1) were construed to apply to reinsurers. LeBoeuf, Lamb Memorandum at 7. Regulation 98 requires reinsurance intermediaries — insurance agents or brokers — to include in any reinsurance contracts with unauthorized reinsurers a provision for the appointment of a local attorney for service of process. N.Y.Comp.Codes R. & Regs. tit. 11, § 32.1(e).

Plaintiff, on the other hand, makes several statutory arguments to demonstrate that § 1213(c)(1) applies to reinsurance treaties. First, plaintiff claims that the broad statutory definitions of "contract of insurance" and "insurer" contained in Article 11 of the New York Insurance Law encompass contracts for reinsurance and reinsurers. See Plaintiff's Sur-Reply at 5-6; N.Y.Ins.Law §§ 1101(a)(1), 107(27). Moreover, plaintiff points to N.Y.Ins.Law

§ 1101(b)(2)(G), which states that § 1213 is applicable to "transactions with respect to the reinsurance of risks of authorized insurers * * *." See Plaintiff's Sur-Reply at 7-8. Plaintiff also notes that while N.Y.Ins.Law § 1213(e) specifically exempts certain classes of insurance, it does not single out reinsurers for exemption. Id. at 8-9. Plaintiff further contends that the presence of a comprehensive consumer protection scheme in Article 31 of the New York Insurance Law undercuts the retrocessionaires' argument that § 1213 was intended as a consumer protection measure. Plaintiff notes that Article 31 specifically exempts reinsurance contracts (see N.Y.Ins.Law § 3108), an indication that when the legislature wishes to exclude a class of business from the reach of an insurance law, it does so explicitly. Plaintiff's Sur-Reply at 9-10. In addition, plaintiff refutes Transnational Limited's argument that Regulation 98 is inconsistent with the application of § 1213 to reinsurers, claiming that "Regulation 98 and § 1213 are simply different ways of meeting the legislative objective of assuring the accountability of foreign or alien insurers." Id. at 11 n. 10. Plaintiff also points out that Regulation 98 does not apply to the Treaty at issue, which was arranged directly between Delta Re and the retrocessionaires, not through reinsurance intermediaries. Id.

Plaintiff asserts that Delta Re was authorized to do business in New York when the Treaty was signed, did most of its business here, and had all of its employees stationed here, and is therefore a "resident" within the meaning of § 1213(b)(1). Plaintiff's Memorandum at 6. Moreover, plaintiff argues that even if Delta Re was not a "resident" of New York, § 1213 requires only that a corporation invoking

the statute be "authorized to do business" in the state. Id. at 6-7. Plaintiff further contends that § 1213 is triggered when an unauthorized insurer engages in any of the activities listed in § 1213(b)(1)(A)-(D), so that the Liquidator's right to invoke the security requirement is not affected by the fact that Delta Re is no longer authorized to do business in New York. Plaintiff's Sur-Reply at 13.

Finally, plaintiff claims that the retrocessionaires' substantive defenses are irrelevant to the application of 1213(c)(1), since the statute requires security before the defendant files any responsive pleading. Plaintiff's Sur-Reply at 16-17.

DISCUSSION

Section 1213 of the New York Insurance Law is primarily a long-arm statute, derived from the Uniform Unauthorized Insurers Act. The statute addresses the "concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies." N.Y.Ins.Law § 1213(a). The principal purpose of the statute, then, is to subject unauthorized foreign and alien insurers[7] who have transacted business in the state to

7. A "foreign insurer" is "any insurer incorporated or organized under the laws of any state * * * other than [New York]." N.Y.Ins.Law § 107(21) (McKinney 1985). An "alien insurer" is "any insurer incorporated or organized under the laws of any foreign nation * * *." Id. § 107(5).

the jurisdiction of the New York courts. The statute accomplishes this purpose by declaring that certain activities on the part of the foreign unauthorized insurer constitute the appointment of the New York Superintendent of Insurance as its attorney for service of process. Id. § 1213(b)(1). In addition, the statute requires the unauthorized insurer, before filing a pleading in a court action, to deposit money or file a bond to insure a fund for the payment of any judgment obtained in the action. Id. § 1213(c)(1)(A); see Dean Construction Co. v. Agricultural Ins. Co., 42 Misc.2d 834, 835, 249 N.Y.S.2d 247, 248-49 (Sup.Ct. Nassau County 1964) (discussing statutory predecessor to § 1213). The activities that bring the unauthorized insurer within the reach of the statute are: "(A) the issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein, (B) the solicitation of applications for such contracts, (C) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (D) any other transaction of business." N.Y.Ins.Law § 1213(b)(1).

It is notable that Section 1213 falls within Article 12 of the New York Insurance Law, entitled "Organization and Corporate Procedure." Section 1212 requires the appointment of the Superintendent of Insurance as attorney for service of process by authorized domestic, foreign, and alien insurers. Section 1214 prohibits insurance agents or brokers from procuring or soliciting policies or certificates of insurance from foreign insurers who have not appointed the Superintendent of Insurance as attorney for service of process. Taken together, these provisions attempt to guarantee that all insurers transacting business in the state

— authorized and unauthorized — will appear in suits brought against them in New York courts.

Section 1213 does not explicitly state that it applies to unauthorized foreign or alien reinsurers; nor does the rather sparse case law construing the statute address this issue. However, § 1101(b), the provision that defines what constitutes "doing an insurance business," appears to deal with the question head-on. Section 1101(b)(2) provides:

> Notwithstanding [the activities listed in subsection (1) that constitute "doing an insurance business"] the following acts or transactions, if effected by mail from outside this state by an unauthorized foreign or alien insurer duly licensed to transact the business of insurance in and by the laws of its domicile, shall not constitute doing an insurance business in this state, but [§ 1213] of this chapter shall nevertheless be applicable to such insurers:
>
> * * *
>
> (G) transactions with respect to the reinsurance of risks of authorized insurers to the extent that such reinsurance is permitted by this chapter.

N.Y.Ins.Law § 1101(b)(2) (emphasis added).

Thus, although the legislature recognized that the business of reinsurance was to be distinguished for some purposes from the business of insurance, it appears that it

did not intend that unauthorized reinsurers be exempted from New York's long-arm statute and security requirement. The only language in § 1213 itself that lends support to defendants' theory that the section does not apply to reinsurers is the statement of legislative purpose, contained in subsection (a), that the provision was enacted to protect residents holding "policies of insurance." While a reinsurance treaty is arguably not a "policy of insurance" or even a "contract of insurance,"[8] the contention that the legislature therefore did not intend § 1213 to apply to reinsurance must be rejected in light of the express language of § 1101(b)(2)(G).

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8. Courts have recognized reinsurance as a distinct class of insurance. See, e.g., Liberty Mutual Ins. Co. v. Gibbs, 773 F.2d 15, 18 (1st Cir.1985) (reinsurance contracts are distinct from contracts " 'insuring against liability' "); Security Mutual Casualty Co. v. Century Casualty Co., 531 F.2d 974, 977 (10th Cir.), cert. denied, 429 U.S. 860 (1976) ("a reinsurance treaty is a contract for insurance, not a contract or policy of insurance"); In re Liquidation of General Indemnity Corp., 274 N.Y. 510, 511, 10 N.E.2d 523, 524 (1937) (reinsureds are not "policyholders"); 19 Couch on Insurance 2d § 80.1, at 624 (rev. ed 1983) ("As a general rule, a reinsurance treaty is an indemnity contract as opposed to one for liability."). The principal significance of this distinction appears to be that "[i]n contrast to an insurer's obligation to pay and defend against its insured's liability whether or not the insured has paid injured third parties, the reinsuer's liability is conditioned upon the insurer's prior payment of loss." Skandia American Reinsurance Corp. v. Schenck, 441 F.Supp. 715, 724 (S.D.N.Y.1977). Consequently, the insured is not considered a third-party beneficiary of the reinsurance treaty, and cannot recover against the reinsurer, even if the insurer becomes insolvent. Id.; see 13A J. Appleman & J. Appleman, supra, § 7695, at 537-38.

Turning to the question of who may invoke § 1213, the statute extends its protections to "residents of this state or to corporations authorized to do business therein." N.Y.Ins.Law § 1213(b)(1)(A). In Clifton Products, Inc. v. American Universal Ins. Co., 169 F.Supp. 842 (S.D.N.Y.1959), the court found that the plaintiff, an Ohio corporation, could not obtain jurisdiction in New York over the defendant, a Rhode Island insurance company that had delivered a policy to the plaintiff in Ohio. The plaintiff's only apparent contact with New York was that it had employed a New York insurance broker to place the risk. In holding that the statutory predecessor to § 1213 did not apply to nonresident plaintiffs, the court noted that the statute "protects only New York residents in suits based on policies delivered to them in this state." Id. at 845.

In Aero Associates, Inc. v. La Metropolitana, 183 F.Supp. 357 (S.D.N.Y.1960), the court permitted the plaintiff, a New York corporation acting as manager for three authorized foreign insurance companies, to invoke the statutory predecessor to § 1213 to obtain personal jurisdiction over a group of Latin American reinsurers, who had delivered a contract for reinsurance, through their New York broker, to the plaintiff in New York.[9] The court observed: "Certain it is that the primary objective of the legislation was to protect New York residents but the statute went further and encompassed those corporations authorized to do business in New York." Id. at 359. The court found that its assumption of jurisdiction over the defendants was consistent with due

9. I note that the defendant-reinsurers in Aero Associates did not raise the objection that the statutory predecessor to § 1213 was inapplicable to reinsurers.

process and that, indeed, the statute "contemplated such jurisdiction in favor of foreign corporations licensed to conduct business in this state."[10] Id. at 360. The court noted that its holding was not in conflict with Clifton Products, decided one year earlier. Id.

In G.C. Murphy Co. v. Reserve Ins. Co., 101 Misc.2d 729, 421 N.Y.S.2d 1006 (Sup.Ct. N.Y.County 1979), modified on other grounds, 74 A.D.2d 235, 427 N.Y.S.2d 800 (1st Dep't 1980), the court held that the plaintiff, a Delaware corporation authorized to do business in New York, was entitled to the protection of the statutory predecessor to § 1213, including the filing of a bond, in a suit against an unauthorized Illinois insurance company that had delivered a policy to the plaintiff in New York. The court observed that

> a foreign corporation licensed to do business in the State and doing business in the State is a "resident" within the meaning of such statute; and, it would undoubtedly be a violation of [the plaintiff's] rights under the Fourteenth Amendment to the United States Constitution to be afforded less protection under law than is

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10. The retrocessionaires attempt to distinguish Aero Associates on the ground that the plaintiff was actually a New York corporation, acting for the benefit of three foreign corporations. See Bower & Gardner Reply at 3-4. However, the court's language indicates that its holding turned on the fact the statute expressly applied to foreign corporations authorized to do business in New York.

> provided to New York citizens when it is present in this jurisdiction and doing business here.

Id. at 733, 421 N.Y.S.2d at 1009.

Based on these cases, I reject the retrocessionaires' argument that the Liquidator, as a nonresident plaintiff, is not entitled to invoke the bonding requirement of § 1213(c)(1). As an initial matter, it is clear that the statute extends its protections to "corporations authorized to do business" in New York. N.Y.Ins.Law § 1213(b)(1)(A). Defendants' contention that G.C. Murphy introduces a two-pronged test which a plaintiff must satisfy to fall within the purview of the statute is simply inaccurate. Under the facts of that case, the plaintiff was present and doing business in New York; the court found that the statute required nothing more. As to whether a foreign corporation that is merely authorized to do business in New York may invoke the statute, Aero Associates and the express language of the statute indicate that it may do so.

I agree with plaintiff that the fact that Delta Re has not been authorized to do business and has not done business in New York since it was declared insolvent in 1985 is irrelevant to the court's exercise of jurisdiction over defendants in this action. When the retrocessionaires executed and delivered the Treaty to Delta Re in New York, Delta Re was present in New York and authorized to do business here. It is the transaction out of which this action arose that triggers the court's jurisdiction under § 1213(b)(1), not the status of the plaintiff at the time the action was commenced.

Moreover, I reject the retrocessionaires' contention, relying on dictum in Clifton Products, that the application of § 1213 to this action denies them constitutional due process. Although at first glance it appears anomalous for a Kentucky liquidator to bring an action on behalf of an insolvent Kentucky reinsurance company against alien and foreign reinsurers in a New York court, plaintiff's motive for bringing the action here seems clear: the action arises out of business allegedly transacted in New York and it is unlikely that plaintiff will be able to obtain personal jurisdiction over the majority of the retrocessionaires in any other forum.

Finally, turning to the retrocessionaires' argument that the security requirement of § 1213(c)(1) was not intended to apply to actions where the validity of the contract is challenged, the language and structure of the statute do not support this theory. The statute requires that security be posted before any responsive pleading is filed. Thus, defendants' defenses, no matter how meritorious, have no bearing on the security requirement. In fact, § 1213(c)(3) specifically sets out the only pertinent pre-answer defense — an unauthorized foreign or alien insurer may make a motion to set aside service on the ground that it did not engage in any of the activities listed under § 1213(b).

As to the amount of security required, I agree with defendants that the security should be for the amount that plaintiff would win as monetary damages, were this case decided in his favor. If plaintiff prevails in this lawsuit, at best he would be entitled to a declaratory judgment that the Treaty is fully enforceable (Complaint ¶ 58); a decree of

specific performance, which would require the retrocessionaires to post letters of credit to secure future payment of claims against Delta Re as they mature (Complaint ¶ 62); payment of the "reinsurance recoverables" due Delta Re, plus interest from the date they became due (Complaint ¶ 62); and attorney's fees under N.Y.Ins.Law § 1213(d).

Plaintiff seeks, as part of the $41,893,700 bond, $12,672,729 in case reserves and $22,474,900 in IBNR. Neither of these components represents fully matured claims. In fact, in an affidavit submitted by plaintiff, James Dickinson, Assistant to the Special Deputy of Delta Re, describes the case reserves as "the estimated losses payable that accrue from reported unpaid claims," and the IBNR as "the current liquidation estate's estimated liability for losses that have occurred but have not yet been reported." Dickinson Aff. at ¶¶ 7, 8 (emphasis added). No matter how accurate these estimates may be, they remain estimates until Delta Re's ceding insurance companies have actually paid out the claims, thus reducing them to a fixed amount of paid losses. It is precisely because the case reserves and IBNR are estimates of sums that the retrocessionaires will allegedly owe in the future that plaintiff was constrained to request the relief of specific performance; if the Treaty is upheld, the retrocessionaires would not be required to pay these sums to the Liquidator, but rather they would be required, under Article X, to post of letters of credit. Moreover, I strongly suspect that the retrocessionaires would challenge the amount of security requested by the Liquidator and that the issue would have to be submitted to arbitration under Article XV of the Treaty.

I therefore find that the case reserves and IBNR — representing approximately $35,000,000 of the security requested by plaintiff — are not appropriate components of a bond "to secure payment of any final judgment which may be rendered" in this action. N.Y.Ins.Law § 1213(c)(1) (emphasis added). The language of the statute does not contemplate the posting of a bond to secure the unauthorized insurer's future performance of a contract of insurance. See Dean Construction Co., 42 Misc.2d at 835, 249 N.Y.S.2d at 248-49 (purpose of the security requirement is "to insure a fund for the payment of any judgment"). The remainder of the security requested by plaintiff — approximately $7,000,000 in paid losses, that is, claims that Delta Re's ceding companies have actually paid — appears to be the amount that the retrocessionaires would be required to pay to the Liquidator as monetary damages if he prevails in this action and is thus the appropriate measure of security under § 1213(c)(1).

CONCLUSION

For the foregoing reasons, the retrocessionaires' motion to be to be relieved of the requirement of posting pre-answer security pursuant to N.Y.Ins.Law § 1213(c)(1) is denied. I find that § 1213 requires the retrocessionaires to post security in an amount that reflects Delta Re's paid losses, that is, the amount that they would be required to pay as monetary damages should plaintiff prevail in this lawsuit.[11] In addition, for purposes of determining the amount of

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11. Plaintiff may apply for an increase in the amount of security as the amount of Delta Re's paid losses increases.

security, the amount that the Liquidator has already drawn down on the letters of credit posted by the retrocessionaires should be applied against Delta Re's paid losses.

The parties are directed to attempt to stipulate to the exact amount of security that must be posted by each defendant pursuant to this Opinion and Order no later than August 17, 1990. In the event the parties are unable to agree on these amounts, they are directed to schedule a conference to be held before me no later than August 31, 1990.

SO ORDERED.